89-488 (1)

No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

ROBERT SEPULVEDA;
RICHARD NERVIK;
WILLIAM J. MERINO;
WILLIAM J. HARRIS;
FRANK AGUIRRE, JR. and
RONALD C. ADLER,

Petitioners,

v.

PACIFIC MARITIME ASSOCIATION;
INTERNATIONAL LONGSHOREMEN'S
& WAREHOUSEMEN'S UNION, LOCAL 94,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

1. Do Appellants have standing to sue as third party beneficiaries for breach of the collective bargaining agreements at issue.

LIST OF PARTIES

The Petitioners before this Court are: Richard Nervik, William J. Merino, and Ronald C. Adler.

The Respondents before this Court are the Pacific Maritime Association and the International Longshoremen's and Warehousemen's Union, Local 94.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

ROBERT SEPULVEDA; RICHARD NERVIK; WILLIAM J. MERINO; WILLIAM J. HARRIS; FRANK AGUIRRE, JR.; RONALD C. ADLER,

Petitioners,

v.

PACIFIC MARITIME ASSOCIATION; INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, LOCAL 94,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners Richard Nervik, William J. Merino, and Ronald C. Adler respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceeding on June 23, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in this matter is for publication; however, the opinion does not yet appear in the advance sheets of the Federal Reporter. The opinion is reprinted in the appendix hereto, p. 1a, infra.

The district court's FINDINGS OF FACT AND CONCLUSIONS OF LAW, and JUDGMENT (Real, C.J.) entered July 17, 1987 have not been reported. They are reprinted in the appendix hereto, p. 22a, and p. 46a, respectively, infra.

JURISDICTION

Petitioners filed actions to enforce provisions of collective bargaining agreements between Respondents Pacific Maritime Association (hereinafter "PMA")

and the International Longshoremen and Warehousemen's Union, Local 94 (hereinafter "Local 94") on June 18, 1986, in the United States District Court for the Central District of California.

Petitioners contended in their action they had standing to sue for breach of the collective bargaining agreements at issue as third party beneficiaries. Petitioners contended they were members of a class referred to and identified in the collective bargaining agreements at issue. Petitioners further contended the union and employer extended the provisions of the collective bargaining agreements at issue to Petitioners as a result of their conduct, which is relevant to the interpretation of the collective bargaining agreements at issue.

On July 17, 1987, the District Court

entered judgment in favor of Local 94, and against the Plaintiffs. Judgment was entered at the conclusion of a bench trial on the bifurcated issue of whether Plaintiffs had standing to maintain their §301 action as third party beneficiaries. The District Court granted Defendants' Motion for involuntary dismissal at the close of Plaintiffs' evidence pursuant to Rule 41(b), FRCP. (CR51).[1]

On August 13, 1987, Plaintiffs timely filed a Notice of Appeal to the United States Court of Appeals for the Ninth

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[1] The above-reference is to document 51 of the District Court Docket Sheet that is appropriately tagged and found in the EXCERPTS OF RECORD filed with the Ninth Circuit pursuant to the provisions of Ninth Circuit Rule 30-1. All subsequent references to the documents contained in the EXCERPTS OF RECORD including a further reference to the relevant pages of such document will be made in the same manner. RT is a reference to the Reporter's Transcript.

Circuit within 30 days after the date of entry of the judgment pursuant to Rules 3(a) and 4(a)(1), FRAP. (CR53).

On June 23, 1989, the Ninth Circuit Court of Appeals filed an opinion affirming the decision of the district court. See, p. 1a, infra. No petition for rehearing was sought.

Petitioners have made no application for an extension of time to file a Petition for Writ of Certiorari.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

29 U.S.C. §185. Suits by and against labor organizations.

Venue, amount, and citizenship.

(a) Suits for violation of contracts

between an employee and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings.

The jurisdiction of the District Court was invoked pursuant to §301(a) of the Labor Management Relations Act, 29 U.S.C. §185(a), and 28 U.S.C. §1337.

Petitioners alleged generally in their complaint that PMA and Local 94 breached

§§8 and 18 of the Foremen's Agreement and Port Supplement in denying Petitioners registration as foremen, and in registering most of the successful applicants as foremen. The merits of Petitioners' claims were not at issue in the bifurcated trial.

Generally, the contentions of the Petitioners are set forth in the Pre-trial Conference Order which identifies the issues of fact remaining to be tried after the trial of the bifurcated issue of standing. (CR40:17-19). Section 8 of the Port Supplement requires the selection of the best qualified applicant or applicants for registration as a foremen. (CR50 ¶9). Petitioners contend that they were as qualified or better qualified for registration than those applicants who were registered as foremen; applicants were registered as foremen who were not

qualified for the open vacancies; applicants were registered as foremen who did not meet the qualifications identified in §8.6 of the Port Supplement; applicants were registered as foremen with less seniority than Petitioners although Petitioners had the same qualifications as those registered; applicants were registered as foremen although they should have been disqualified from registration for one or more of the reasons set forth in §8.81 of the Port Supplement; individuals who participated in the selection process were biased in favor of one or more of the successful applicants, and biased against one or more of the Petitioners; and the best applicants for foremen were not registered. (CR 40: 17-19).

Most of the evidence on the underlying merits showing the clear departures from

the registration requirements of §§8 and 18 of the Port Supplement was filed by Petitioners in Opposition to the Motions for Summary Judgment filed by Respondents. On March 31, 1987, the District Court entered an Order denying said Motions.

In the Pre-trial Conference Order, the parties stipulated to bifurcating and pre-trying the issues of standing and exhaustion of the collective bargaining grievance procedures raised by the Defendants. The parties further stipulated to trying the bifurcated issues to the Court, and the remaining issues concerning the underlying merits of Plaintiffs' claims by a jury. (CR 40:2, 16-21).

The bifurcated isses were tried by the Court without a jury on June 24, 1987. The evidence presented at the trial consisted of documentary evidence which was admitted

by stipulation (CR48:Joint Exhibits, RT:5); an extensive list of stipulated facts which were admitted and required no proof as set forth in Pre-trial Conference Order (CR 40: 3-16, RT:4); additional stipulations that the collective bargaining agreements at issue are contracts between an employer and labor organization within the meaning of §301, and the maritime industry involved in this matter affects commerce within the meaning of §301 (CR44:6, RT4); and the testimony of the Petitioners. At the conclusion of the presentation of Petitioners' case, Respondents moved for an involuntary dismissal pursuant to Rule 41(b), FRCP. The court granted the motion only on the issue of standing. The court did not reach and did not resolve the remaining bifurcated issue concerning the exhaustion of contract grievance procedures

raised by the Respondents. (CR51).

The district court determined that the action could not be maintained because Petitioners lacked standing to sue for breach of the collective bargaining agreements at issue. The district court determined that Petitioners were neither members of the bargaining unit covered by the agreement, nor third party beneficiaries of the agreement. (CR51). The district court made no findings or conclusions regarding the underlying merits of Petitioners' claims concerning their contentions that PMA and Local 94 failed to comply with the specific registration requirements for foremen that are set forth in §8 of the Port Supplement.

B. Statement of Facts.

1. The parties.

Petitioners are individuals who

applied for and were denied registration as foremen for longshoremen in the Los Angeles/Long Beach Harbors ("Harbor") during the recent registration process for selection of foremen by Defendants. (CR50:1). Petitioners are non-bargaining unit employees. Petitioners are not members of Local 94. Petitioners are not members of the foremen's bargaining unit covered by the Foremen's Agreement and the Port Supplement, the collective bargaining agreements at issue. Petitioners were not working under the foremen's agreement at the time of their application or interview for registration as foremen. (CR50:3-4).

PMA is an employer organization comprised of individual employers located in the States of California, Oregon and Washington who employ members of the International Longshoremen's and

Warehousemen's Union (hereinafter "ILWU"), and others, as longshoremen for the movement of cargo on vessels, loading and discharging from vessels various cargo, and handling freight on docks including warehouse and container freight stations all pursuant to the scope, terms and conditions of the Pacific Coast Longshore Contract Document, (hereinafter "Contract Document"), a collective bargaining agreement between PMA and ILWU. (Id.:2).

PMA is an association of companies engaged in maritime shipping, receiving and warehousing of goods in ports along the Pacific Coast of the United States. PMA serves as the representative of its employer members in collective bargaining with the ILWU. PMA member companies employ essentially three groups of employees who belong to distinct bargaining units covered

by three separate labor contracts. In the Harbors, the longshoremen's unit is represented by ILWU, Local 13, the marine clerks' unit by ILWU, Local 63, and the walking bosses and foremen's unit by ILWU, Local 94. Employees are hired into each unit primarily by means of the formal registration process under the respective contracts. (Id.)

PMA employs members of Local 94 and others as foremen of longshoremen in the Harbors. Foremen act as the direct supervisory representatives of the employers in the performance of all cargo handling and stevedoring activities covered under the Contract Document. Foremen have the responsibility and authority to supervise, place or discharge men, and to direct the work and activities of longshoremen on the job in a safe,

efficient and proper manner. (Id.)

Local 94 is recognized as the exclusive bargaining representative of employees who work for PMA as foremen of longshoremen in the Harbors. Local 94 is voluntarily affiliated with the International. (Id.:3)

PMA and the ILWU locals representing walking bosses and foremen, including Local 94, have executed successive collective bargaining agreements covering the employment terms and conditions of walking bosses and foremen. The most recent agreement is the Pacific Coast Walking Bosses and Foremen's Agreement, 1984-1987 (previously and hereinafter referred to as "Foremen's Agreement"). PMA and Local 94 have also negotiated and executed successive supplemental agreements called Port

Supplements which cover the employment terms and conditions of walking bosses and foremen working in the Harbors. The most recent Supplement is the Foremen's Port Supplement, 1984-1987 (previously and hereinafter referred to as "Port Supplement"). The two agreements set forth procedures for the registration of foremen to be administered by a joint union-management committee known as the Foremen's Joint Labor Relations committee (hereinafter "Joint Committee"). (Id.)

2. Relevant contract provisions.

PMA and all locals and units of ILWU, including Local 94, agreed to Section 8.22 of the 1984-1987 Foremen's Agreement which authorizes the registration of additional foremen pursuant to the provisions of local port supplements. Section 8.22 provides as follows:

"When additions to the registered list are to be made, the selection of such additional men shall be made in accordance with provisions contained in local supplements". (Id.:4)

Pursuant to Section 8.22 of the Foremen's Agreement, PMA and Local 94 have negotiated §8 of the Port Supplement.[2] Section 8 contains provisions applicable to the registration of foremen under the administration of the Joint Committee and its Registration Subcommittee. Sections 8.13 and 8.21 of the Port Supplement (1984-1987) provide that the Joint Committee

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[2] The relevant provisions of §8 of the Port Supplement are set out verbatim in the opinion of the Ninth Circuit, p. 10a-15a, infra.

"shall select the best qualified applicant or applicants" on the basis of the applications on file, the information presented by the applicants, and personal interviews. Section 8.53 of the Port Supplement (1984-1987) provides that an applicant "shall be accepted only if he is qualified for the open vacancy". Section 8.6 of the Port Supplement (1984-1987) sets forth the fourteen (14) "[q]ualification factors that will be considered" by the Joint Committee.

The fourteen qualification factors are not discretionary. For an individual to be registered as a foreman, he or she must meet each of the fourteen qualification factors identified in §8.6. According to §8.71, there are no exceptions and no extenuating circumstances permitted. Section 8.71 provides that:

"[A]ll of the above qualifications [which are identified in Section 8.6] must be met by each individual with no exceptions; there shall be no extenuating circumstances".

Section 8.8 of the Port Supplement lists eleven (11) "disqualification" factors. (Id.) Section 8.81(a)-(k) sets forth the eleven circumstances under which an applicant shall be disqualified from consideration.

Finally, §18 of the Foremen's Agreement and Port Supplement provide as follows:

"As an explicit condition hereof, the parties are committed to observe this Agreement in good faith. The Union commits the locals and

every Walking Boss/Foreman it represents to observe this commitment without resort to gimmicks or subterfuge. The Employers give the same guarantee of good faith observance on their part." (Id.)

3. The challenged registration.

In March, 1985, the Joint Committee devised and made available applications for registration of additional individuals to be hired into the foremen's unit represented by Local 94. (CR50:5).

The application form included the following question:

"55. Do you agree that this application for registration as Foremen of Longshoremen is to be considered by the

> [ILWU] and the [PMA] on the basis of the rules and procedures the ILWU and the PMA agree to use in considering applications for registration?
>
> "YES_____ NO_____"
>
> (Id.; CR 48:Ex. 2).

All of the Plaintiffs herein responded in the affirmative to Question 55 on the application form. (CR50:5).

An instruction sheet accompanied each application. The instruction sheet provides in relevant part as follows:

> "This application must be completed in the applicant's own handwriting (do not use typewriter) and submitted in duplicate in accordance with the following schedule:

"Persons who have not been fully registered as a Class 'A' longshoreman or clerk for at least five (5) years or persons who are not registered in the Los Angeles-Long Beach harbors are not eligible for selection.

"This application is subject to the provisions of the Foremen's Port Supplement, Section 8, and the applicable requirements of the Pacific Coast Walking Bosses and Foremen's Agreement and Foremen's Labor Relations Committee requirements." (Id.;CR48; Ex.1).

The application form also required the applicants to acknowledge by their signature on the application their understanding that:

> "It is agreed that applicant may file a grievance with the Foremen's Joint Labor Relations Committee if he is dissatisfied with action or inaction on this application; that the time limit for filing of such grievance is ten (10) days after knowledge of the facts giving rise to the issue; that this procedure provides the exclusive original jurisdiction for such questions and must be exhausted before resort to

any other administrative or judicial tribunal or agency." (Id.:6; CR48; Ex.2).

The applications were reviewed and scored by the Registration Subcommittee of the Joint Committee. The Registration Subcommittee was comprised of eight members: four Local 94 representatives, and four PMA representatives. The Registration Subcommittee used the "Olympic scoring system." Accordingly, each committee member scored each application. the highest and lowest scores were discarded. The remaining six scores were averaged to achieve the final score on the application. (Id.:6)

In scoring the applications, the Registration Sub-committee used the "Foremen Application Scoring Sheet." (Id.:7)

After the applications were scored, the Subcommittee granted job interviews to 250 applicants with the highest average application scores. All of the plaintiffs received interviews, except William Harris, who is no longer a party to this appeal, whose score was too low. (Id.)

Interviews were held in July, 1985. Each interviewee met separately with the full Subcommittee. The interview consisted of a short written essay on a supervision problem, a verbal quiz that tested the applicant's knowledge of the industry, and a discussion of the applicant's work experience and any factors that would distinguish the applicant over others. At the end of each interview, each committee member filled out a "Foremen Interview Scoring Sheet." (Id.)

After all interviews were

completed, the Subcommittee fed the eight separate scores for each interview into a PMA computer. Again using the Olympic scoring system, the Subcommittee had the computer discard the high and low scores and average the remaining six scores to achieve the final score for each applicant. The computer printed a list that ranked the applicants according to their final scores. (Id.)

In August, 1985, the Joint Committee registered the top 23 applicants on the computer list. In November, 1986, the next group of 25 from the top of the list were registered. The list is still "active", and additional applicants on the list may be registered as openings arise. (Id.)

At the present time there are 171 individuals ranked on the computer list.

The Petitioners herein hold the following positions on the subject list:

Name	Position
W. Merino	90
R. Adler	116
R. Nervik	152

(Id.:8).

4. Petitioners' grievances.

Petitioners filed grievances with the Joint Committee from the denial of registration as foremen. On December 19, 1985, the Joint Committee met with Petitioners to discuss Plaintiffs' grievances. At the conclusion of the meeting, the Joint Committee advised the Plaintiffs that their grievances were denied. (Id.)

REASONS FOR GRANTING THE WRIT

I. The Decision of the Lower Court is Erroneous with Consequences Impacting Cargo Handling and Stevedoring Activities on the Entire Western Coast.

This Court has determined that third party beneficiaries to a collective bargaining agreement ordinarily have the right to bring a Section 301 claim based on the contract. International Brotherhood of Electrical Workers v. Hehler ___ U.S.___, 107 S.Ct. 2161, 2169 n.7, ___ L.Ed.2d __ (1987); Smith v. Evening News Assn. 371 U.S. 195, 200-01 (1962); Lewis v. Benedict Coal Co. 361 U.S. 459, 467-70.

Section 301 specifically authorizes suits by individual employees to vindicate uniquely personal rights. Hines v. Anchor Motor Freight, Inc. 420 U.S. 554, 562, 97

S.Ct. 1048, 1055, 47 L.Ed.2d 231 (1976); Smith v. Evening News Association 371 U.S. 195-200, 83 S.Ct. 267, 270 (1962); Painting and Decorating Contractors Association v. Joint Committee 707 F.2d 1067, 1071 (9th Cir. 1983); Rehmar v. Smith, 555 F.2d 1362, 1367 (9th Cir. 1977). Section 301 jurisdiction exists for breach of a collective bargaining agreement even though, as in the instant appeal, the union owes the employees no duty of fair representation. Rehmar v. Smith, supra, at 1370.

In the present petition, the lower court ignored undisputed evidence in affirming the district court's finding that Petitioners were not third party beneficiaries to the collective bargaining agreements at issue. The consequences of this decision are great and impact all

those performing cargo handling and stevedoring activities in the states of California, Oregon, and Washington.

Petitioners seek to enforce the provisions of §§8 and 18 of the Foreman's Agreement and Port Supplement in denying Petitioners' registration as foreman of longshoremen. Section 8.22 of the Foreman's Agreement requires the selection of additional foreman to be made in accordance with the provisions of the local supplements. (CR 48, Ex.26:41). Thus, permitting the Respondents herein to disregard the clear provisions of the local port supplement in registering foreman authorizes the same or similar conduct by PMA and the other locals in the states of California, Oregon, and Washington.

Petitioners directly benefit from §8 of the Port Supplement. Foreman act as the

direct supervisors of those performing cargo handling and stevedoring activities along the Pacific Coast. A promotion to foreman is a highly desireable job and is achieved after many years of service as a longshoreman and/or clerk. The goal of so many to become a foreman should not be frustrated by a blatant departure from the strict requirements for registration described in §8 of the Port Supplement. Confidence in the integrity of the registration process to become foreman is important to those whose goal after many years is to become a foreman.

In determining whether Petitioners were third party beneficiaries to the collective bargaining agreements at issue, the Court of Appeals applied California law to the extent that it is compatible with Federal Labor policy. Relying on a

previous decision of the Ninth Circuit, Karo v. San Diego Symphony Orchestra Association 762 F.2d 819 (9th Cir. 1985), the Court restated a summary of the California law on third party beneficiaries. In so doing, the Court of Appeals stated as follows:

> "'A third party qualifies as a beneficiary under a contract if the parties intended to benefit the third party and the terms of the contract make that intent evident.' [citations omitted] 'In discerning intent, the Court may look to evidence outside the four corners of the document, such as the circumstances and negotiations of the parties in making the contract.' [citations] 'Although the beneficiary need

not be made in the contract, he must be a member of a class referred to and identified in it.'" (Slip. Op., at 7a-9a, infra, citing Karo, 762 F.2d 821-22.)

A. Petitioners Can Maintain the Instant Action as Third Party Beneficiaries to the Collective Bargaining Agreements at Issue. The District Court's Finding that the Port Supplement did not Evidence an Intent to Benefit or Confer a Right Upon Petitioners is Clearly Erroneous.

The Respondents offered no evidence at the trial other than the stipulated facts; their Rule 41(b) Motion to Dismiss was granted at the conclusion of the presentation of Petitioners' case. The

documentary evidence submitted by the parties pursuant to stipulation establishes the rights of Petitioners to sue as third party beneficiaries to enforce the provisions of §8 of the Port Supplement. The credibility of the Plaintiff witnesses is not at issue. Petitioners submit that a review of the evidence introduced at trial will leave the reviewing court with the definite and firm conviction that a mistake has been committed. United States v. United States Gypshon Co., 333 U.S. 364, 395 (1948). There is no evidence in the record to contradict the documentary evidence showing the intent of PMA and Local 94 by their conduct, as reflected in the documentary evidence, to extend the provisions of §8 of the Port Supplement to the Petitioners.

1. The relevant provisions of §8 of the Port Supplement show that Petitioners are members of the class referred to and identified in the Port Supplement.

Petitioners are members of the class referred to and identified in the Port Supplement between PMA and Local 94. Section 8.1 requires the Joint Committee to establish a list of fully registered foremen, a list of probationary registered foremen, and a list of prospective foremen. Petitioners are currently on the computer list of prospective foremen. (CR50:¶¶21-22).

The Port Supplement continues by providing in relevant part at Sections 8.13 and 8.21 that the "best qualified" applicant or applicants shall be selected.

Section 8.5 of the Port Supplement concerns the application for registration and provides specifically at §8.53: "An applicant shall be excepted only if he is qualified for the open vacancy." (Id.:13).

Section 8.6 of the Port Supplement identifies that factors that each applicant must possess for registration. Each of these factors are identified supra, (Brief 12-14).

Section 8.7 of the Port Supplement requires all of the qualifications of the §8.6 to be met; there are no extenuating circumstances. (CR48, Ex. 25:14). Section 8.71 provides as follows: "8.71 all of the above qualifications must be met by each individual with no exceptions; there shall be no extenuating circumstances." (Id.)

Section 8.8 of the Port Supplement concerns disqualification and sets forth

the circumstances in §8.81(a)-(k) requiring the disqualification of an applicant. (Id.:15-16).

Finally, Section 8.12 of the Port Supplement requires the Joint Committee and the Registration Subcommittee to act in "a non-discriminatory manner." (CR48, Ex.25:9). Similarly, §18 of the Foremen's Agreement and Port Supplement require PMA and Local 94 to observe the agreements at issue "in good faith". (Id.:24; Ex. 26:58).

As individuals on the list of prospective foremen, Petitioners are members of the class referred to and identified in §8.11. Further, as applicants, Petitioners are members of the class referred to and identified in §§8.13, 8.2, 8.5, 8.6, 8.7, and 8.8 of the Port Supplement. As such, Petitioners have standing to require PMA and Local 94 to

comply with the mandatory provisions of §§8.6 and 8.7 of the Port Supplement, and the mandatory grounds for disqualification of an applicant set forth in §8.8 of the Port Supplement.

Section 8 of the Port Supplement provides a detailed procedure and specific requirements for registration of applicants as foremen. Petitioners are those applicants. Petitioners are also on the list of prospective foremen as identified in §8.11 of the Port Supplement. (CR 50:¶¶21-22).

Finally, the class of individuals who would have standing as third party beneficiaries under the terms of §8 of the Port Supplement to enforce the various subsections is well defined. First, any individual on the list of prospective foremen, such as Petitioners, pursuant to

§8.11. Secondly, the broader classification of individuals who must be "fully registered as a Class 'A' longshoremen or clerk for at least five years or persons who are not registered in Los Angeles-Long Beach [Harbors]." (CR48, Ex.1) In the present matter, each of the Petitioners are fully registered Class "A" longshoremen for at least five years in Harbors. (RT:17, 43, 51-52, 67-68; CR 50; ¶¶18, 22).

2. The conduct of PMA and Local 94 and the interpretation of the Port Supplement show Petitioners are third party beneficiaries.

Any doubt as to Petitioners ability to sue as third party beneficiaries has been resolved by a review of the instruction sheet accompanying the

application, the application at issue, and various minutes of the Joint Committee. These documents are admissible for the purpose of interpreting the sections of the collective bargaining agreements at issue. In interpreting collective bargaining agreements, a court considers, in part, "[T]he interpretation of the contract by the parties, and the conduct of the parties bearing upon its meaning." Int'l Brotherhood of Elc. Workers v. NLRB 788 F.2d 1412, 1414 (9th Cir. 1986).

Each of the Petitioners in this action submitted an application for registration as a foreman. Each application had an instruction sheet which accompanied the application. The instruction sheet provides in relevant part as follows:

" Persons who have not been fully registered as a Class "A" longshoreman or clerk or persons who are not registered in the Los Angeles-Long Beach are not eligible for selection.

" This application is subject to the provisions of the Foreman's Port Supplement, Section 8, and the applicable requirements of the Pacific Coast Walking Bosses and Foremen's Agreement'". (CR48, Ex. 1).

Similarly, each of the Petitioners' applications contain an identical question, No. 55, which provides as follows:

" Do you agree that this application for registration as Foreman of Longshoremen is to be considered by the International Longshoremen's and Warehousemen's Union (ILWU) and the Pacific Maritime Association (PMA) on

the basis of the rules and procedures the ILWU and the PMA agree to use in considering applications for registration?

"Yes _____ No _____."

Each of the Petitioners answered yes to question 55. (CR50:¶13).

Therefore, we see from a review of the instruction sheet and the application that the entire registration process is subject to the provisions of §8 of the Foreman's Port Supplement. Thus, Petitioners can reasonably expect and require PMA and Local 94 to comply with the provisions of §8 of the Port Supplement in selecting individuals for registration as foreman.

The expectation of the Petitioners that Local 94 and PMA will comply with the provisions of §8 of the Port Supplement in selecting applicants for registration as a

foreman is further supported by minutes of the Joint Committee. The minutes, along with the application and instruction sheet, are relevant to show the intent of PMA and Local 94 in having Petitioners receive the benefit of §8 of the Port Supplement, as members of the broader class of applicants and the select computer list of prospective foremen.

In the September 24, 1985 meeting of the Joint Committee, the Committee states in response to the group grievance filed by Petitioners and others as follows:

> " The Committee reviewed the protest in detail. The Committee noted that the registration of additional foreman is governed by the Foreman's Joint Port Labor Relations Committee and the Registration Subcommittee in strict accordance with Section 8 of the

Pacific Coast Walking Bosses and Foreman's Agreement and Foreman's Port Supplement... " (emphasis added) (CR48, Ex.29:2).

The Joint Committee made the same representation to Petitioners at their meeting of December 19, 1985 at which time the Joint Committee again considered the grievance of Petitioners. The Joint Committee states as follows:

" The registration of additional foreman is governed by the Foreman's Joint Labor Relations Committee and the Registration Subcommittee in strict accordance with Section 8 of the . . . Foremen's Agreement, the Foremen's Port Supplement ..." (CR48, Ex.19:1-2).

Furthermore, Petitioners contend that application of the grievance procedure to

them as set forth in the Foremen's Agreement implies an intent on the part of PMA and Local 94 to make Petitioners third party beneficiaries to the contract contrary to the Court's conclusion of law number 7. (CR50:11). The minutes of the Joint Committee for December 19, 1985 concern the meeting between the Joint Committee and several longshoremen who filed grievances regarding the foremen's registration, including Petitioners. (CR48, Ex. 19:1). The Joint Committee minutes show conclusively that the Joint Committee considered the grievance machinery within the collective bargaining agreements to have been exhausted by Petitioners. The Joint Committee minutes provide in relevant part as follows:

> "The Committee agreed that the grievance machinery within the

Foreman's Agreement has been exhausted concerning this matter." (Id.:2).

The application provides that an applicant who is dissatisfied with the action or inaction of the Joint Committee on his or her application is to file a grievance with the Joint Committee. (CR48, Ex. 2:8 ¶5). In fact, the application states that he or she understands that compliance with the grievance procedure is a condition of the Joint Committee receiving the application. (Answer to question 57; Id. 7-8). The application provides as follows:

"It is agreed that applicant may file a grievance with the Foremen's Joint Labor Relations Committee if he is dissatisfied with action or inaction on this application; that the time limit for filing of such grievance is

ten (10) days after knowledge of the facts giving rise to the issue; that this procedure provides the exclusive original jurisdiction for such questions and must be exhausted before resort to any other administrative or judicial tribunal or agency." (Id.)

The documentary evidence presented at the trial establishes that Petitioners are third party beneficiaries under the collective bargaining agreement at issue, the Foremen's Port Supplement which incorporates various provisions of the Foremen's Agreement. The Petitioners are entitled to enforce the specific qualification factors that PMA and Local 94 were required to follow, and the grounds for disqualification of an applicant as set forth in §§8.6, 8.7, and 8.8 of the Port Supplement. PMA and Local 94 have extended

the provisions of §8 of the Port Supplement to Petitioners by the various terms of §8 including the fact that Petitioners are on the computer list of prospective foremen, and the conduct of PMA and Local 94 in their actions to implement §8 of the Port Supplement. The instruction sheet, questions 55 and 57, sub-part 5, and the Joint Committee minutes of September 24 and December 19, 1985 clearly show that Petitioners are members of a class referred to and identified in the Port Supplement.

3. Petitioners established clear violations of the specific provisions of §8 or the Port Supplement.

Although a resolution of the underlying merits was not presented to the Ninth Circuit, the Ninth Circuit was requested to review the evidence developed

by Petitioners which showed clear violations of §8 of the Port Supplement by Respondents. Respondents in their briefs filed with the Ninth Circuit requested the Ninth Circuit to give deference to the Respondents in the interpretation and application of the collective bargaining agreements at issue. In response to that request, Petitioners described in detail the evidence clearly showing Respondents departed from the strict requirements of §8 of the Port Supplement.

Respondents have already conceded that the provisions of §8 of the Port Supplement must be strictly applied to all applicants for registration as foreman by the Committee. (See, Committee Minutes of September 24 and December 19, 1985; CR, Ex.29:2 and Ex.19:1-2). In light of the major violations of the Port Supplement

which occurred during the recent registration process, the strict provisions of Sections 8.6, 8.7 and 8.8 of the Port Supplement, and the Respondents own admission that the registration process must strictly comply with §8, judicial deference should not be given to the Respondents' actions in this matter.

Petitioners had not completed their discovery in this matter when they filed their opposition to Local 94's motion for summary judgment. (CR 19:3)[3]. Petitioners had not taken the depositions of individual members of PMA's and Local 94's Registration Committee. However, Petitioners identified numerous violations

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[3] The Plaintiffs' opposition to Local 94's motion for summary judgment filed on February 23, 1987, district court docket no. 19, shall hereinafter be referred to as "Brief in Opp." with the appropriate page references.

of the terms of §8 of the Port Supplement. The major violations identified in Petitioners opposition to Local 94's summary judgment motion are described as follows. The evidence is found in the record from the district court at docket entry 19 filed on February 23, 1987.

The first group of applicants who were successfully registered as foreman are identified in the Committee minutes of August 29, 1985. (CR 48, Ex. 17). The second group of applicants who were registered as foreman are identified in Committee minutes of September 22, 1986. (CR 48, Ex. 18). Petitioners identified a great many of those registered who do not meet the requirements of 8.6 and 8.7 of the Port Supplement, or who should have been disqualified from registration pursuant to Section 8.8 of the Port Supplement or the

instructions or practices of the Committee.

The registration of Henry Kuha on September 22, 1986, and the registration of William Mosich and Tony Hernandez on August 29, 1985 were in violation of Sections 8.81(e) an 8.86(e) of the Port Supplement. 8.6(e) provides: "[E]ach applicant must have the ability to formulate and convey clear and concise work instructions to the men working under him." 8.81(e) requires the disqualification of an applicant for: "Lack of ability to read and write the English language or illegible penmanship." (CR 48, Ex.25: 14, 16).

Carrie Schwab testified at her deposition that there was no specific checklist an interviewer should look at in evaluating a written essay question. However, the Registration Committee "[L]ooked for their knowledge of the

contract, grievance machinery, the safety code, their knowledge of proper chain of command." (Schwab Depo at 52:12-18, 53:7-15; attached to Brief in Opp.; CR 19: 33-34). Carrie Schwab also testified that the Committee in evaluating the answer to the essay question was "[L]ooking for a generally good, complete answer." (Id. at 55: 25-26, 56:1-5; Brief in Opp.; CR 19:36).

Henry Kuha's answer to the essay question provides as follows:

"FIRST TO RECIEV TO ORDERS
"LOOK WORKING AREA IS SAFE
"LOOK THE GEAR YOU HAVTO USE
IS SAFE"

(Attached to Brief in Opp.; CR19:63).

The answer to the essay question by Tony Hernandez provides as follows:

"Make sure all gear for safe working

"Make sure sure a lan woek safe

"Make sure your wire

"Make sure all gone

"Make sore ship gene

"Make sur all [illegible]:

"Make sure all men for safety gear"

(Attached to brief in Opp.; CR 19:62).

The answer to the essay question by William Mosich provides as follows:

"Use the rite tipe of gear

"discharging safe as paslhe

"sow now get hart on"

"n the fobe." (Attached to Brief in Opp.; CR 19:64).

A cursory review of the answers to the essay question described above shows 1)

they are not good complete answers to the essay question; 2) they do not show a knowledge of the contract, grievance procedure, the safety code, or a knowledge of proper chain of command; 3) they do not show an ability to read or write the English language; 4) the penmanship is illegible; and 5) they do not show an ability to formulate and convey clear and concise work instructions.

The registration of Jewel Langford on September 22, 1986 was in violation of Section 8.8 (k) of the Port Supplement. 8.8(k) provides: "No consideration shall be given to an applicant while a complaint against him is being processed under the grievance procedure and until the complaint has been processed to a conclusion." (CR 19, Ex. 25:16). Attached as Exhibit "3" to the Declaration of David Torrez is the non-

dispatch list for the Marine Terminals Corporation dated January 15, 1987. (CR 19:121-22, 172). The non-dispatch list shows that on April 4, 1986, an employer complaint was filed against Jewel Langford by Marine Terminals Corporation when Jewel Langford failed to show and wait for a replacement. As of January 15, 1987, the employer complaint was still pending. Thus, at the time Jewel Langford was registered as a foreman on September 22, 1986, Langford had an employer complaint being processed which had not been resolved.

The registration of Joseph D. Herrin and Raymond Matthews on September 22, 1986 was in violation of the instructions concerning registration. The application instructions required the application to be completed and submitted

in duplicate. The Committee minutes of September 24, 1985 state: "All applications had to be completed in duplicate, completely filled out and signed". (emphasis added) (Attached to Brief in Opp.; CR 19:51; CR 48, Ex. 29:3).

The Committee minutes of June 18, 1985 state that 7 individuals were "[D]isqualified from further consideration because they failed to sign both copies of their application." (emphasis added). (Attached to Brief in Opp.; CR 19:53; CR 48, Ex. 15:1).

The FOREMAN APPLICATION SCORING SHEETS concerning Joseph Herrin prepared by Gordon Reynolds and Eddie Mondor show that Joseph Herrin did not sign his application and, therefore, should have been disqualified. (Attached to Brief in Opp.; CR 19: 58-9).

The FOREMAN APPLICATION SCORING SHEET of Raymond Matthews prepared by Gordon Reynolds shows that Raymond Matthews did not sign his application, and therefore, should have been disqualified from registration. (Attached to Brief in Opp.; CR 19:60).

The registration of Philip Vlaic on September 22, 1986 was in violation of the Committee minutes of September 13, 1976 (Attached to Brief in Opp.; CR 19:61). The minutes provide: "It was agreed that if a scorer felt he were prejudiced for or against a particular applicant, he would disqualify himself from scoring that particular application." (Id.) Local 94 President James North testified at his deposition that Local 94 advised its members of the Registration Committee that they should disqualify themselves if they

were biased, in favor, or against, a particular applicant. (North Depo at 64:19-26, 65:1-6; Attached to Brief in Opp.; CR 19:41-2). North also testified that the requirement in the minutes of the Committee's meeting of September 13, 1976 that an individual should disqualify himself for bias was discussed by the current Registration Committee at its meeting of February 26, 1985. (Id. at 66: 3-26, 67:1-18; Brief in Opp.; CR 19:43-4.) North continued by testifying that John Vlaic was an alternate member of Local 94's Registration Committee, and John Vlaic and Philip Vlaic are brothers. (Id. at 64:12-18; Brief in Opp.; CR 19:41). Finally, North testified that he would not let John Vlaic score Philip Vlaic's application or interview, and that he knew John Vlaic would not do it. (Id. at 65:8-25; Brief in

Opp.; CR 19:42). One of the FOREMAN INTERVIEW SCORING SHEETS of Philip Vlaic shows that it was signed by John Vlaic. Therefore, John Vlaic participated in the interview of his brother Philip, in direct violation of the non-bias rules of the Registration Committee. (Attached to Brief in Opp.; CR 19:61).

Petitioner Richard Nervik was told by Local 94 official and Registration Committee member Donald Draskovich that the reason Nervik was not registered as a foreman was that Nervik is a "nightman". (Nervik Decl. ¶8; Brief in Opp.; CR 19:175).

Carrie Schwab testified in her deposition that the Registration Committee did not consider in the registration process the fact that an individual worked nights as opposed to days. (Schwab depo

33:4-21; attached to Brief in Opp.; CR 19:32).

The Nervik Declaration shows that Mr. Nervik has substantial diversity of experience as a longshoreman. (Brief in Opp.; CR 19:174). The refusal to register Nervik as a foreman because Nervik works nights as stated by Draskovich is in direct violation of Port Supplement Sections 8.6 and 8.8. Neither 8.6 nor 8.8 require the disqualification or denial of registration to a longshoreman who works nights.

The Declaration Petitioner Ronald Adler sets forth the reasons that he was not registered as a foreman. Eddie Mondor, a representative of Local 94 on the Foreman's Registration Committee, was asked the reason Adler was not selected for registration. Eddie Mondor was present during the scoring of Adler's interview,

and prepared a FOREMAN INTERVIEW SCORING SHEET of Adler. (Attached to Brief in Opp.; CR 19:230).

Mondor stated that at the conclusion of Adler's interview, a member of the Registration Committee told the Committee that they should not take Adler. Adler was stated to have vandalized equipment causing the job to shut down at the expense of the company, to have shot the clock in the dispatch hall, and to be a police informant. None of the allegations are true. (Adler Declaration ¶¶8 and 9; attached to Brief in Opp.; CR 19: 205).

The false representations at Adler's interview by a member of the Registration Committee is in violation of the requirement that an individual should disqualify himself if he is biased for or against a particular applicant.

Finally, each of the Petitioner reviewed the following documents pertaining to each of the successful applicants for registration as foreman: their application, their FOREMAN APPLICATION SCORING SHEETS, their FOREMAN INTERVIEW SCORING SHEETS, their answer to the essay question, and their PMA WORK HISTORIES FOR A THREE YEAR PERIOD ENDING JULY 1985. Each of the Plaintiffs submitted a written response to Local 94's First Set of Written Interrogatories. Attached to each of the interrogatories is an Attachment "A". (CR 19:138). Paragraph 1 of Attachment "A" sets forth a list of twenty-nine (29) individuals who have insufficient experience and/or inadequate distribution of experience within the meaning of Port Supplement 8.81(j). The individuals listed also do not have the ability to perform or

direct work on all operations coming under the authority of a foreman within the meaning of Port Supplement 8.6(d).

CONCLUSION

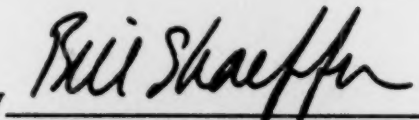
It is submitted that PMA and Local 94 should not be permitted to disregard the representations they have made to the foremen applicants, including Petitioners, regarding the fairness, integrity, and criteria for registration of foremen that are set forth in §8 of the Port Supplement, the application, the instruction sheet, and the grievance meetings held by the Joint Committee to address the Petitioners concerns. It is respectfully submitted that the District Court clearly erred in concluding that Petitioners were not third party beneficiaries entitled to enforce the provisions of the collective bargaining agreements at issue.

For the foregoing reasons, it is respectfully requested that the Petition for Writ of Certiorari be granted.

DATED: September 20, 1989
Newport Beach, CA

Respectfully submitted,

SILVER, GOLDWASSER & SHAEFFER
A Professional Law Corporation

By 
GEORGE W. SHAEFFER, JR.
Attorneys for Petitioners

A0010.PET

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT SEPULVEDA; RICHARD NERVIK; WILLIAM J. MERINO; WILLIAM J. HARRIS; FRANK AGUIRRE, JR.; RONALD C. ADLER,

Plaintiffs-Appellants,

v.

PACIFIC MARITIME ASSOCIATION; INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, LOCAL 94,

Defendants-Appellees.

NO.87-6283
D.C. NO.
CV-86-3976-R

OPINION

Appeal from the United States District Court for the Central District of California

Manuel L. Real, Chief District Judge, Presiding

Argued and Submitted
January 12, 1989--Pasadena, California

Filed June 23, 1989

Before: J. Clifford Wallace, William C. Canby, Jr. and Stephen S. Trott, Circuit Judges.

Opinion by Judge Wallace

WALLACE, Circuit Judge:

Seven unsuccessful applicants for employment as foremen of longshoremen brought this action under section 301 of the Labor Management Relations Act, 29 U.S.C. §185, against Pacific Maritime Association (Pacific Maritime) and International Longshoremen's and Warehousemen's Union, Local 94 (Local 94), alleging breach of a collective bargaining agreement (Agreement). The district court dismissed the action with prejudice, finding that the seven lacked standing to sue for breach of the Agreement. Four of them (Applicants) took this appeal. The district court had jurisdiction under 29 U.S.C. §185, and we have jurisdiction over this timely appeal pursuant to 28 U.S.C. §1291. We affirm.

I

Pacific Maritime represents its employer members in collective bargaining with the International Longshoremen's and Warehousemen's Union (ILWU). Pacific Maritime member companies employ three groups of employees who belong to three bargaining units covered by three distinct labor contracts. At the Los Angeles/Long Beach Harbors (the Harbors), the longshoremen's unit is represented by ILWU Local 13, the marine clerks by ILWU Local 63, and the walking bosses and foremen by ILWU Local 94. Employees are hired into each unit primarily by means of a formal registration process under the respective contracts.

Pacific Maritime and Local 94 have executed successive collective bargaining agreements covering the terms and

conditions of employment of walking bosses and foremen. The Agreement details the procedure for registering foremen. The registration process is administered by a joint union-management committee (the Committee). The Agreement provides that the Committee "shall select the best qualified applicant or applicants" on the basis of the applications on file, the information presented by the applicants, and personal interviews. The Agreement enumerates both "qualification" and "disqualification" factors which the Committee must consider.

Applicants were denied registration as foremen at the Harbors. Applicants allege that Pacific Maritime and Local 94 breached the Agreement by not registering them. Applicants contend that the Committee disregarded or misapplied the

"qualification" and "disqualification" factors and thereby failed to register the "best qualified applicants" as mandated by the Agreement. Applicants were not bargaining unit employees: they were members of neither Local 94 nor the foremen's bargaining unit covered by the Agreement.

The parties stipulated to a bifurcated trial at which the issue of Applicants' standing would be tried first without a jury. At the conclusion of Applicants' case, the district court granted Pacific Maritime and Local 94's motion to dismiss pursuant to Fed.R.Civ.P. 41(b). The court found that Applicants lacked standing to sue for breach of the Agreement, reasoning that Applicants failed to show that the Agreement was made for their benefit.

II

In a bench trial, the court may voluntarily dismiss an action under Rule 41(b) when the court finds, after considering the evidence, that the plaintiff has not established a prima facie case. Fed.R.Civ.P. 41(b); Stone v. Millstein, 804 F.2d 1434, 1436-37 (9th Cir. 1986) (Stone). We review the district court's dismissal under Rule 41(b) the same as a judgment in defendant's favor after a bench trial; the district court's legal conclusions are reviewed independently and its findings of fact for clear error. Stone, 804 F.2d at 1437. We will reverse the court's findings of fact only upon a definite and firm conviction that a mistake has been made. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); Gregory K. v. Longview School

District, 811 F.2d 1307, 1310 (9th Cir. 1987) (Gregory K.). We review the court's findings of fact for clear error even if the court relied exclusively on a written record. Gregory K., 811 F.2d at 1310.

III

To have standing to bring an action for breach of a collective bargaining agreement, a party must be either a member of the collective bargaining unit covered by the agreement or a third party beneficiary of that agreement. Karo v. San Diego Symphony Orchestra Association, 762 F.2d 819, 821 (9th Cir. 1985) (Karo). Conceding that they are not members of the collective bargaining until covered by the Agreement, Applicants argue that they are third party beneficiaries.

To determine whether Applicants are third party beneficiaries to the Agreement,

we apply California law to the extent it is compatible with federal labor policy. Id. "A third party qualifies as a beneficiary under a contract if the parties intended to benefit the third party and the terms of the contract make that intent evident." Id. at 821-22, citing Garcia v. Truck Insurance Exchange, 36 Cal.3d 426, 436-37, 204 Cal.Rptr. 435, 439-40, 682 P.2d 1100, 1104-05 (1984) (Garcia); Strauss v. Summerhays, 157 Cal.App. 3d 806, 816, 204 Cal.Rptr. 227, 233 (1984); Kirst v. Silna, 103 Cal.App.3d 759, 763, 163 Cal.Rptr. 230, 232 (1980). In discerning intent, the court may look to evidence outside the four corners of the document, such as the circumstances and negotiations of the parties in making the contract. Garcia, 36 Cal.3d at 437. "Although the beneficiary need not be named in the contract, he must

be a member of a class referred to and identified in it." Karo, 762 F.2d at 822.

As evidence of the intent of the parties to the Agreement, Applicants offered the Agreement, the application which all prospective registrants had to complete, and minutes from a meeting of the Committee. The court found that this evidence did not establish that Pacific Maritime and Local 94 intended the Agreement to benefit or confer rights upon Applicants. We can reverse only if the court's finding was clearly erroneous. See, Local 3-7, International Woodworkers of America v. Daw Forest Products Co., 833 F.2d 789, 793 (9th Cir. 1987) (finding regarding intent of parties in making contract reviewed for clear error); May v. Nevada Irrigation District, 600 F.2d 1280, 1282 (9th Cir. 1979) (same).

Applicants first argue that they are members of the class referred to and identified by the Agreement. They point out that the Agreement requires the Committee to maintain a list of prospective foremen. Applicants are on that list. Applicants also point to several passages in the Agreement which provide that the Committee shall register new foremen from applications on file.[1]

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[1] Applicants refer to the following passages in the Agreement:

8.11 The Foremen's Joint Labor Relations Committee shall establish and maintain a list of fully registered foremen, and a list of prospective foremen as they deem necessary based upon the needs of the Employers of foremen in the Los Angeles/Long Beach Harbors.

8.12 The Foremen's Joint Labor Relations Committee and the Registration Sub-committee shall act in a nondiscriminatory manner. . . .

8.13 Vacancies in the list of fully registered foremen, probationary foremen,

and in the list of prospective foremen shall be filled by the Registration Sub-committee acting under the direction and control of the Foremen's Joint Labor Relations Committee. In so doing, it shall select the best qualified applicant or applicants on the basis of applications on file with it that meet the requirements for consideration for registration, the information presented to the subcommittee, and personal interview.

. . .

8.21 Whenever it is determined that one or more vacancies exist in the list of prospective foremen, the Registration Sub-Committee -- acting under the direction and control of the Foremen's Joint Labor Relations Committee -- shall select the best qualified applicant or applicants on the basis of applications on file with it, the information presented to the sub-committee, and personal interview. A man shall be considered for the prospective foremen list only if he has an active application for registration on file when such consideration is given.

. . .

8.53 An applicant shall be accepted only if he is qualified for the open vacancy.

. . .

8.6 Qualification factors that will be considered.

(a) Each applicant must have a background of experience in the shipping and stevedore industry. The bare minimum shall be five (5) years of experience as a longshoremen or equivalent other employment, but additional credit shall be given for time in excess of the five (5) years.

(b) Each applicant's record as a temporary foreman shall be reviewed by the Sub-Committee.

(c) Each applicant must be mentally able, physically fit and capable of performing the functions of a foreman, with no physical handicaps that will limit his activities aboard ship or on the dock in the performance of his duties. No applicant shall be accepted who is an habitual drinker, or who is subject to seizures, blackouts or mental deficiencies that would endanger the lives of his fellow workers.

(d) Each applicant must have the ability to perform and direct work on all operations coming under his authority as a foreman. This extends to the man's ability to get men to work in accordance with safe and productive methods.

(e) Each applicant must have the ability to formulate and convey clear and concise work instructions to the men working under him.

(f) Each applicant's work knowledge, including training and ability shall be thoroughly reviewed by the Sub-Committee.

(g) Each applicant must have a good knowledge of rigging.

(h) Knowledge and understanding of sound safety practices are of great importance in the consideration of an applicant.

(i) Each applicant's record with respect to discipline shall be reviewed and considered. Each applicant's work record must show a general habit of compliance with the working rules. Each applicant must have the ability to take and carry out orders.

(j) Each applicant must have an understanding of the Contract and must be willing to carry out all of the provisions of the Contract.

(k) Each applicant must be a steady worker. Flops, going in or out of gangs, not registering, picking jobs, etc., shall count against the applicant.

(l) Each applicant's record of

earnings and hours shall be reviewed. For Example: These records may show whether or not a man is dependable at all times.

(m) Each applicant must be a citizen of the United States.

(n) Where the Foremen's Joint Labor Relations Committee concludes that all other qualifications of any two or more applicants are equal, length of time employed in the shipping and stevedore industry shall be determinative.

. . .

8.71 All of the above qualifications must be met by each individual with no exceptions; there shall be no extenuating circumstances.

. . .

8.81 An applicant shall be disqualified for any of the following:

(a) Possible lack of availability whenever needed.

(b) Possible unreliability.

(c) Habitual drinking, drug addiction, or unsound mental condition.

(d) Physical handicap.

Applicants' applications are on file.

The district court found that nothing in these passages demonstrates an intent to give non-employee job applicants the right to claim benefits or a right of performance under the contract. Although these passages may indeed characterize

---

(e) Lack of ability to read and write the English language or illegible penmanship.

(f) Poor safety record or knowledge.

(g) Lack of knowledge of job.

(h) Inability to get men to work with him.

(i) Lack of supervisory ability.

(j) Insufficient experience in the industry or inadequate distribution of experience among various categories.

(k) No consideration shall be given to an applicant while a complaint against him is being processed under the grievance procedure and until the complaint has been processed to a conclusion.

Applicants, they do so in a most nondescript manner. These passages indicate that the Committee may only hire persons who properly applied for and are qualified for the job and that the Committee must keep a record of all applicants. The registration provisions apply equally to any individual seeking the position. Karo, 762 F.2d at 822 (agreement equally applicable to any person seeking position does not indicate intent to confer third party beneficiary rights on applicants). Moreover, Applicants have not shown that these procedures were intended for their benefit. It appears more likely that the procedures were intended for the mutual benefit of Pacific Maritime and Local 94. The procedures help to ensure that foremen selected are competent to discharge their responsibilities -- a goal

of Pacific Maritime --and also maintain the standards of the trade union -- a goal of Local 94. See, Id. (applicant failed to show that application procedures were not for the benefit of the employer). We conclude that the district court was not clearly erroneous in finding that the passages referred to by Applicants do not indicate an intent to make them third party beneficiaries to the Agreement.

Applicants next argue that certain additional documents indicate they are third party beneficiaries to the Agreement. Applicants first contend that the registration application and accompanying instruction sheet created an expectation that the Committee would comply with the Agreement in registering foremen. Applicants point to the following language:

Persons who have not been fully registered as a Class "A" longshoremen or clerk for at least five (5) years or persons who are not registered in Los Angeles-Long Beach are not eligible for selection.

This application is subject to the provisions of the [Agreement].

. . .

Do you agree that this application for registration as Foremen of Longshoremen is to be considered by the International Longshoremen's and Warehousemen's Union (ILWU) and the Pacific Maritime Association (PMA) on the basis of the rules and procedures the ILWU and the PMA agree to use

in considering applications for registration?

Yes _____ No _____

In addition, the application provides that an applicant may file a grievance with the Committee if he is dissatisfied with the action on his application. Finally, Applicants contend that minutes from a Committee meeting establish that Applicants are third party beneficiaries to the Agreement. The minutes reflect that the Committee acknowledged that registration of foremen is governed in strict accordance with the Agreement.

The district court found that this extrinsic evidence did not establish that Pacific Maritime and Local 94 intended to make Applicants third party beneficiaries to the Agreement. To the extent that the

language in the application and minutes confirms that the registration procedures are to be administered pursuant to the Agreement, Applicants are repeating their first argument: the terms of the Agreement reflect an intent to confer third party beneficiary status on Applicants. As we held above, the district court's finding to the contrary on this issue was not clearly erroneous. Likewise, one cannot infer from the additional documents that the grievance procedure was not intended to benefit Pacific Maritime and Local 94. See, Karo, 762 F.2d at 822. This formal mechanism, whereby dissatisfied applicants may have their files reviewed, increases the likelihood a qualified but errantly rejected applicant will be registered. This assists in the selection of the best qualified of those applying, but it does

not necessarily grant standing to bring suit by a disappointed applicant. We cannot conclude that the district court's finding was clearly erroneous.

AFFIRMED.

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FILED
JUL 15, 1987

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DAVID L. TORREZ, et al., Plaintiffs, v. PACIFIC MARITIME ASSN., et al., Defendants.	Case No. CV 86-3976R FINDINGS OF FACT AND CONCLUSIONS OF LAW ENTERED CLERK U.S. DISTRICT CRT JUL 17 1987

Pursuant to Rules 41(b) and 52(a), F.R.Civ.P., and Local Rule 14.3, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiffs David L. Torrez, Steve Rodin, Jr., Richard Nervik, William J. Merino, William J. Harris, Frank Aguirre, Jr., and Ronald C. Adler are residents of the County of Los Angeles, State of California. Plaintiffs are individuals who applied for and were denied registration as foremen of longshoremen in the Los Angeles/Long Beach Harbors ("Harbors") during the recent registration process for selection of foremen by Defendants.

2. Defendant Pacific Maritime Association ("PMA") is an employer organization comprised of individual employers located in the States of California, Oregon and Washington who employ members of the International Longshoremen's and Warehousemen's Union (hereinafter "ILWU"), and others, as

longshoremen for the movement of cargo on vessels, loading and discharging from vessels various cargo, and handling freight on docks including warehouse and container freight stations all pursuant to the scope, terms and conditions of the Pacific Coast Longshore and Clerks Agreement "(Contract Document"), a collective bargaining agreement between the PMA and ILWU.

3. Member companies of the PMA also employs members of Local 94 and others as foremen of longshoremen in the Harbors. Foremen act as the direct supervisory representatives of the employers in the performance of all cargo handling and stevedoring activities covered under the Contract Document. Foremen have the responsibility and authority to supervise and to otherwise direct the work and activities of longshoremen on the job in a

safe, efficient and proper manner.

4. PMA is an association of companies engaged in maritime shipping, receiving and warehousing of goods in ports along the Pacific Coast of the United States. PMA serves as the representative of its employer members in collective bargaining with the ILWU. PMA member companies employ essentially three groups of employees who belong to distinct bargaining units covered by three separate labor contracts. In the Harbors, the longshoremen's unit is represented by ILWU, Local 13, the marine clerks by ILWU Local 63, and the walking bosses and foremen by ILWU Local 94. Employees are hired into each unit primarily by means of the formal registration process under the respective contracts.

5. Defendant Local 94 is recognized

as the exclusive bargaining representative of employees who work for PMA as foremen of longshoremen in the Harbors. Defendant Local 94 is voluntarily affiliated with the ILWU. Defendant Local 94 has its principal place of business in the City of Wilmington, County of Los Angeles, State of California.

6. PMA and the ILWU locals representing walking bosses and foremen, including Local 94, have executed successive collective bargaining agreements covering the employment terms and conditions of walking bosses and foremen. The most recent agreement is the Pacific Coast Walking Bosses and Foremen's Agreement, 1984-1987 ("Foremen's Agreement"). PMA and Local 94 have also negotiated and executed successive supplemental agreements called Port

Supplements which cover the employment terms and conditions of walking bosses and foremen working in the Harbors. The most recent Supplement is the Foremen's Port Supplement, 1984-1987 ("Port Supplement"). The two agreements set forth procedures for the registration of foremen to be administered by a joint union-management committee known as the Foremen's Joint Labor Relations Committee ("Joint Committee").

7. Plaintiffs are non-bargaining unit employees. Plaintiffs are not members of Local 94. Plaintiffs are not members of the foremen's bargaining unit covered by the Foremen's Agreement and the Port Supplement. Plaintiffs were not working under the Foremen's Agreement at the time of their application or interview for registration as foremen.

8. Defendants PMA and Local 94 agreed to Section 8.22 of the Foremen's Agreement which authorizes the registration of additional foremen pursuant to the provisions of local port supplements.

9. Pursuant to Section 8.22 of the Foremen's Agreement, PMA and Local 94 have negotiated Section 8 of the Port Supplement. Section 8 contains provisions applicable to the registration of foremen under the administration of the Joint Committee and its Registration Subcommittee. Sections 8.13 and 8.21 of the Port Supplement provides that the Joint Committee "shall select the best qualified applicant or applicants" on the basis of the applications on file, the information presented by the applicants, and personal interviews. Section 8.53 of the Port Supplement provides that an applicant

"shall be accepted only if he is qualified for the open vacancy". Section 8.6 of the Port Supplement sets forth the "[q]ualification factors that will be considered" by the Joint Committee, and Section 8.71 provides that "[a]ll of the above qualifications [which are identified in Section 8.6] must be met by each individual with no exceptions; there shall be no extenuating circumstances". Finally, Section 8.8 of the Port Supplement lists "disqualification" factors.

10. The registration provisions of the Port Supplement apply equally to any individual seeking employment with PMA as a foreman of longshoremen.

11. The terms of the collective bargaining agreement at issue do not evidence an intent on the part of defendants to benefit or confer a right of

performance on plaintiff-job applicants.

12. In March, 1985, the Joint Committee devised and made available applications for registration of additional individuals to be hired into the foremen's unit represented by Local 94. The Joint Committee received 472 applications for approximately 25 initial openings.

13. The application form included the following question:

> "55. Do you agree that this application for registration as Foremen of Longshoremen is to be considered by the [ILWU] and the [PMA] on the basis of the rules and procedures the ILWU and the PMA agree to use in considering applications for registration?
>
> "YES_____ NO_____"

All of the Plaintiffs herein responded in the affirmative to Question 55 on the application form.

14. An instruction sheet accompanied each application. The instruction sheet provides in relevant part as follows:

This application must be completed in the applicant's own handwriting (do not use typewriter) and submitted in duplicate in accordance with the following schedule:

Persons who have not been fully registered as a Class 'A' longshoreman or clerk for at least five (5) years or persons who are not registered in the Los Angeles-Long Beach harbors are not eligible for selection.

This application is subject to the provisions of the Foremen's Port Supplement, Section 8, and the applicable requirements of the Pacific Coast Walking

Bosses and Foremen's Agreement and Foremen's Labor Relations Committee requirements.

15. The application form also required the applicants to acknowledge by their signature on the application their understanding that:

> It is agreed that applicant may file a grievance with the Foremen's Joint Labor Relations Committee if he is dissatisfied with action or inaction on this application; that the time limit for filing of such grievance is ten (10) days after knowledge of the facts giving rise to the issue; that this procedure provides the exclusive original jurisdiction for such questions and must be exhausted before

resort to any other administrative or judicial tribunal or agency.

16. The applications were reviewed and scored by the Registration Subcommittee of the Joint Committee. The Registration Subcommittee was comprised of eight members: four Local 94 representatives, and four PMA representatives. The Registration Subcommittee used the "Olympic scoring system." Accordingly, each committee members scored each application. The highest and lowest scores where discarded. The remaining six scores were averaged to achieve the final score on the application.

17. In scoring the applications, the Registration Subcommittee used the "Foremen Application Scoring Sheet".

18. After the applications were

scored, the Subcommittee granted job interviews to 250 applicants received interviews, except William Harris, whose score was too low.

19. Interviews were held in July, 1985. Each interviewee met separately with the full essay on a supervision problem, a verbal quiz that tested the applicant's knowledge of the industry, and a discussion of the applicant's work experience and any factors that would distinguish the applicant over others. At the end of each interview, each committee member filled out a "Foreman Interview Scoring Sheet."

20. After all interviews were completed, the Subcommittee fed the eight separate scores for each interview into a PMA computer. Again using the Olympic scoring system, the Subcommittee had the computer discard the high and low scores

and average the remaining six scores to achieve the final score for each applicant. The computer printed a list that ranked the applicants according to their final scores.

21. In August, 1985, the Joint Committee registered the top 23 applicants on the computer list. In November, 1986, the next group of 25 from the top of the list were registered. The list is still "active", and additional applicants on the list may be registered as openings arise.

22. At the present time there are 171 individuals ranked on the computer list. The plaintiffs herein, except for William Harris who did not receive an interview, hold the following positions on the subject list:

Name	Position
S. Rodin	65
W. Merino	90

R. Adler	116
F. Aguirre	126
R. Nervik	152
D. Torrez	165

23. Plaintiffs filed a grievance with the Joint Committee from the denial of registration as foremen. On December 19, 1985, the Joint Committee met with Plaintiffs to discuss Plaintiffs' grievances. At the conclusion of the meeting, the Joint Committee advised the Plaintiffs that their grievances were denied.

24. It was fair, appropriate and within the bounds of the contract for the Defendants to devise an application, to ask the Plaintiffs and other applicants for foremen registration to fill out the application, to score the application, to conduct an interview and to score the

interview, and the questions asked in the interview and in the application are deemed generally relevant and appropriate with respect to seeking information relevant to the decision of registering someone as a foreman.

25. Any finding of fact which is found to constitute a conclusion of law is deemed to be one.

CONCLUSIONS OF LAW

1. Plaintiffs' claims are for breach of a collective bargaining agreement under Section 301 of the Labor Management Relations Act, 29 U.S.C. §185. The gravamen of the complaint is that PMA and Local 94 breached the Port Supplement by misjudging the relative qualifications of the applicants and failing to include Plaintiffs in the first group of registered

applicants. More specifically, Plaintiffs allege that defendants disregarded or misapplied the "qualification" and disqualification" factors enumerated in Section 8.6 and 8.81 of the Port Supplement, respectively, and failed to register "the best qualified applicants" as provided in Section 8.13 of the Port Supplement. Plaintiffs contend that they are among "the best qualified" and should have been registered.

2. It is the law of this circuit that in order to have standing to bring an action for breach of a collective bargaining agreement, an individual plaintiff must be either a member of the collective bargaining unit covered by that agreement, or otherwise a third party beneficiary of that agreement. Karo v. San Diego Symphony Orchestra Assn.., 762 F.2d

819, 821 (9th Cir. 1985) (Karo). See, McTighe v. Mechanics' Education Society of America, 772 F.2d 210, 213 (6th Cir. 1985) (employer had no duty to comply with the terms of the agreement in its dealings with plaintiff "because he was not a member of the collective bargaining unit.").

3. Plaintiffs herein lack standing to sue as bargaining unit members because, as they have stipulated (Pre-Trial Conference Order, p.5), they are not members of the foremen's unit represented by Local 94.

4. Nor do Plaintiffs have standing to sue PMA and Local 94 as third party beneficiaries of the Foremen's Agreement and Port Supplement. Plaintiffs have not established that they are "third party beneficiaries" under California law, which is applicable to this action. See, Karo 762 F.2d at 821, 822.

5. California Civil Code Section 1559 provides that "[a] contract, made expressly for the benefit of a third party, may be enforced by him at any time before the parties thereto rescind it". Interpreting Section 1559, the court explained in Karo, 762 F.2d at 821-822, that "[a] third party qualifies as a beneficiary under a contract [only] if the parties intended to benefit the third party and the terms of the contract make that intent evident." (emphasis supplied). Accord: Ascherman v. General Reinsurance Corp., 183 Cal.App.3d 307, 311-312, 228 Cal.Rptr. 1 (1986). Thus, although "the beneficiary need not be named in the contract, he must be a member of a class referred to and identified in it." Karo, 762 F.2d at 822. Further, even if a contract, "if carried out according to its terms, would inure to [the benefit of a

third party], it is not sufficient to entitle him to demand its fulfillment. It must appear to have been the intention of the parties to secure to him personally the benefit of its provisions." Walters v. Calderon, 25 Cal.App.3d 863, 871, 102, Cal.Rptr. 89 (1972) (emphasis in original). Accord: Walters v. Marler, 83 Cal.App.3d 1, 32, 147 Cal.Rptr. 685 (1978). See also Sherman v. British Leyland Motors, Ltd., 601 F.2d 429, 440 n. 13 (9th Cir. 1979) ("incidental beneficiary" had no standing to sue; "[w]here there was no direct undertaking or intention to benefit him he had no rights under [the] contract"); Martinez v. Socoma Companies, Inc., 11 Cal.3d 394, 113 Cal.Rptr. 585, 521 P.2d 841 (1974) (government contracts under which private manufacturers agreed to provide job training and at least on year of employment

to disadvantaged plaintiffs could not be enforced by such plaintiffs as third party beneficiaries; even though plaintiffs unquestionably would benefit from performance of the contracts, there was no intent to confer a direct right of performance on the disadvantaged plaintiffs).

6. In support of their claim that Plaintiffs have standing to sue as third party beneficiaries, Plaintiffs cite certain language of the Foremen's Agreement, Port Supplement and the Application Materials for Registration. These contractual provisions set forth the factors to be considered in judging the qualifications of applicants for registration as foremen, and provide that the Joint Committee shall select the best qualified applicant or applicants on the

basis of the applications on file, the information presented to the Registration Subcommittee and personal interviews. There is nothing in the provisions cited by Plaintiffs, however, that evidences an intent on the part of Defendants PMA and Local 94 to give non-employee job applicants the specific right to claim benefits or a right of performance under the contract.

7. Plaintiffs argue that Paragraph 5 of the Application for Registration as Foreman (Exhibit 2 Page 8), which provides a grievance procedure for applicants who are "dissatisfied with action or inaction on [his or her] application," evinces an intent to make Plaintiffs third party beneficiaries under the contract. That provision also states that "this procedure provides the exclusive original

jurisdiction for such questions and must be exhausted before resort to any other administrative, judicial, tribunal or agency." Plaintiffs argue that the existence of this grievance procedure implies an intent on the part of the PMA and Local 94 to make the Plaintiffs third party beneficiaries to the contract. There is nothing in this provision from which this Court can infer such an intent.

8. Absent the requisite intent on the part of the contracting parties to benefit or confer a right of performance on plaintiff-job applicants, the Court must conclude that plaintiffs herein lack standing as third party beneficiaries to sue for breach of the collective bargaining agreement at issue.

9. Because plaintiffs do not have standing as members of the bargaining unit

or as third party beneficiaries, the action for breach of the collective bargaining agreement must be dismissed.

10. Any conclusion of law which is found to constitute a finding of fact is deemed to be one.

DATED: July 15, 1987

_____
U.S. District Judge

SUBMITTED BY:

GIBSON, DUNN & CRUTCHER
DENNIS A. GLADWELL
J. KEVIN LILLY
TERESA H. SHARP

BY:_____
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FILED
JUL 15, 1987

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DAVID L. TORREZ, et al., Plaintiffs, v. PACIFIC MARITIME ASSN., et al., Defendants.	Case No. CV 86-3976R JUDGMENT ENTERED CLERK U.S. DISTRICT CRT. JUL 17 1987

The issue of standing in the above-entitled matter was tried before the Court without a jury on June 24, 1987. At the

conclusion of plaintiffs' case defendants jointly moved for dismissal pursuant to Rule 41(b), F.R.Civ.P. The Court having considered the evidence presented and hearing heard and considered oral argument,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. This action cannot be maintained because plaintiffs lack standing to sue for breach of the collective bargaining agreement. Plaintiffs are neither members of the bargaining unit covered by the agreement nor third party beneficiaries of the agreement.

2. Plaintiffs having failed to establish their standing to proceed, this lawsuit is hereby dismissed with prejudice.

3. Judgment shall be entered forthwith in favor of the defendants and against the plaintiffs.

4. Cost shall be awarded to the defendants.

Dated: July 15, 1987 _____
U.S. District Judge

SUBMITTED BY:
GIBSON, DUNN & CRUTCHER
DENNIS A. GLADWELL
J. KEVIN LILLY
TERESA H. SHARP

BY:_____
J. KEVIN LILLY

Attorneys for Defendant
Pacific Maritime Association

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(2)

Supreme Court, U.S.
FILED
NOV 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-488

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

ROBERT SEPULVEDA, et al.,
Petitioners,

VS.

PACIFIC MARITIME ASSOCIATION and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 94,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

NO PET

QUESTION PRESENTED

1. Whether the district court clearly erred in finding that the signatories to a collective bargaining agreement did not intend to confer any right of performance on applicants for employment under that agreement.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The Opinion of the court of appeals (Pet.App. 1a-21a) is reported at 878 F.2d 1137. The opinion of the district court (Pet.App. 22a-48a) is unreported.

JURISDICTION

The opinion of the court of appeals was filed on June 23, 1989. The petition for a writ of certiorari was filed on September 21, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

A. Introduction

The Petitioners are three unsuccessful applicants for employment as foremen of longshoremen in the Los Angeles/Long Beach Harbors (hereinafter, "the Harbors"). They were denied registration as foremen during the 1985 registration process conducted jointly by defendants Pacific Maritime Association (hereinafter, "PMA") and International Longshoremen's and Warehousemen's Union, Local 94 (hereinafter, "Local 94"). Petitioners allege, in substance, that PMA and Local 94 breached the Foremen's Port Supplement, 1984-1987 (hereinafter, "the Port Supplement"), which contains provisions applicable to the registration of new foremen, by misjudging the relative qualifications of the applicants. Petitioners further allege that they were among "the best qualified" applicants and, therefore, should have been registered pursuant to the terms of the Port Supplement. The complaint is premised upon Petitioner's contention that they have the right to enforce the Port Supplement as third party beneficiaries.

B. The Respondents

PMA is an association of companies engaged in maritime shipping, receiving and warehousing of goods in ports along the Pacific Coast of the United States. PMA serves as the representative of its employer members in collective bargaining with the International Longshoremen's and Warehousemen's Union (hereinafter, "ILWU"). PMA member companies employ essentially three groups of employees who belong to distinct bargaining units covered by three separate labor contracts. In the Harbors, the longshoremen's unit is represented by ILWU Local 13, the marine clerks by ILWU Local 63, and the walking bosses and foremen by Local 94. Employees are hired into each unit primarily by means of a formal registration process under the respective contracts. (Pet.App. 23a-25a).

Defendant Local 94 is a labor organization affiliated with the ILWU and is the exclusive bargaining representative of walking bosses and foremen of longshoremen employed by PMA member companies in the Harbors. Walking bosses and foremen serve as

management representatives and directly supervise longshoremen in their work activities. (Pet.App. 24a-26a).

C. The Collective Bargaining Agreement

PMA and the ILWU locals representing walking bosses and foremen, including Local 94, have executed successive collective bargaining agreements covering the employment terms and conditions of walking bosses and foremen. The agreement relevant herein is the Pacific Coast Walking Bosses and Foremen's Agreement, 1984-1987 (hereinafter "the Foremen's Agreement"). PMA and Local 94 have also negotiated and executed successive supplemental agreements which cover the employment terms and conditions of walking bosses and foremen working in the Harbors. The relevant supplement herein is the Port Supplement. The two agreements set forth procedures for the registration of foremen to be administered by a joint union-management committee known as the Foremen's Joint Labor Relations Committee (hereinafter, "the Joint Committee"). (Pet.App. 26a-27a).

Pursuant to Section 8.22 of the Foremen's Agreement, which authorizes the registration of additional foremen pursuant to the provisions of local port supplements, PMA and Local 94 have negotiated Section 8 of the Port Supplement. Section 8 contains provisions applicable to the registration of foremen under the administration of the Joint Committee and its Registration Subcommittee. The registration provisions of the Port Supplement apply equally to any individual seeking employment with PMA as a foreman of longshoremen. (Pet.App. 28a-29a).

Sections 8.13 and 8.21 of the Port Supplement provide that the Joint Committee "shall select the best qualified applicant or applicants" on the basis of the applications on file, the information presented by the applicants, and personal interviews. Section 8.53 of the Port Supplement provides that an applicant "shall be accepted only if he is qualified for the open vacancy". Section 8.6 of the Port Supplement sets forth the "[q]ualification factors that will be considered" by the Joint Committee and Section 8.71 provides that "[a]ll of the above qualifications [which are identified in Section 8.6] must be met by each individual with no exceptions; there shall be no extenuating circumstances". Finally,

Section 8.8 of the Port Supplement lists "disqualification" factors. (Pet.App. 10a-15a).

D. The 1985 Registration Process

In March, 1985, the Joint Committee devised and made available applications for registration of additional individuals to be hired into the foremen's unit represented by Local 94. The Joint Committee received 472 applications for approximately 25 initial openings. (Pet.App. 30a).

The applications were reviewed and scored by the Registration Subcommittee of the Joint Committee. The Registration Subcommittee was comprised of eight members: four Local 94 representatives, and four PMA representatives. The Registration Subcommittee used the "Olympic scoring system". Accordingly, each committee member separately scored each application. The highest and lowest scores were discarded. The remaining six scores were averaged to achieve the final score on the application. (Pet.App. 33a).

After the applications were scored, the Subcommittee granted job interviews to the 250 applicants with the highest average application scores. All of the Petitioners herein received interviews. (Pet.App. 33a-34a).

Interviews were held in July, 1985. Each interviewee met separately with the full Subcommittee. The interview consisted of a short written essay on a supervision problem, a verbal quiz that tested the applicant's knowledge of the industry, and a discussion of the applicant's work experience and any factors that would distinguish the applicant over others. At the end of each interview, each committee member filled out a "Foreman Interview Scoring Sheet." (Pet.App. 34a).

After all interviews were completed, the Subcommittee fed the eight separate scores for each interview into a PMA computer. Again using the Olympic scoring system, the Subcommittee had the computer discard the high and low scores and average the remaining six scores to achieve the final score for each applicant. The computer printed a list that ranked the applicants according to their final scores. (Pet.App. 34a-35a).

In August, 1985, the Joint Committee registered the top 23 applicants on the computer list. In November, 1986, the next group of 25 from the top of the list were registered. At the time of the trial in this matter there were remaining 171 individuals ranked on the computer list. The Petitioners herein held the following positions on the subject list:

Name	Position
W. Merino	90
R. Adler	116
R. Nervik	152

(Pet.App. 35a-36a).

E. The Decisions Below

The district court found (Pet.App. 29a-30a) that "the terms of the collective bargaining agreement at issue do not evidence an intent on the part of [PMA and Local 94] to benefit or confer a right of performance on plaintiff-job applicants." Having found a lack of the requisite intent, the district court concluded (Pet.App. 44a) that Petitioners "lack[ed] standing as third party beneficiaries to sue for breach of the collective bargaining agreement . . .". Accordingly, the court dismissed the complaint with prejudice and entered a judgment in favor of Local 94 and PMA.

The court of appeals affirmed. The court explained (Pet.App. 21a) that the finding of the district court—that there was no intent on the part of PMA and Local 94 to benefit or confer a right of performance on job applicants—was not clearly erroneous.

ARGUMENT

A. There Is No Reason To Grant The Writ

The court of appeals correctly applied settled principles to the facts of this case. Its decision does not conflict with decisions of this Court or of other courts of appeals. Nor does its decision present special or important federal questions which have not been, but should be, settled by this Court.

Petitioners' conclusory assertion that the decision below impacts "cargo handling and stevedoring activities on the entire West Coast" is left unexplained and, in any event, is without foundation. In fact, this case merely involves a dispute initiated by a handful of dissatisfied job applicants who believe they are "better qualified" to serve as supervisors of longshoremen in the Harbors than the individuals selected. By placing before the district court the many applications and scoring sheets, apparently to show the purported shortcomings of those selected for registration (*see* Pet. 53-64), Petitioners make clear that under the guise of a breach of contract theory, they desire the courts simply to adopt Petitioner's *personal views* as to the qualifications of those registered. However, federal labor law as well as judicial economy prohibit the courts from making hiring decisions for Local 94 and PMA.

Thus, the decisions below—that Petitioners lack standing to sue Local 94 and PMA for their asserted failure to select the "best qualified" applicants—conform to the settled principle that in the American system, private industry must be allowed to make its own employment decisions, even "wrong" ones, free from government intrusion, absent discrimination or other statutory violations. *See United Steelworkers of America v. Webber*, 443 U.S. 193, 206 (1976) (It was the intent of Congress in adopting Title VII that "management prerogatives and union freedoms be left undisturbed to the greatest extent possible."); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (in Title VII action, court of appeals erred in requiring employer to prove that the person hired "had superior objective qualifications for the position."); *Cotton v. City of Alameda*, 812 F.2d 1245, 1249 (9th Cir. 1987) ("The ADEA does not make it unlawful for an employer to do a poor job of selecting employees. It merely makes it unlawful to discriminate on the basis of age."). For these reasons, further review is unwarranted.

B. Petitioners Lack Standing To Sue As Third Party Beneficiaries Of The Port Supplement

In order to have standing to bring an action for breach of a collective bargaining agreement, a plaintiff must be either a member of the collective bargaining unit covered by that agree-

ment, or otherwise a third party beneficiary of that agreement. *Karo v. San Diego Symphony Orchestra Assn.*, 762 F.2d 819, 821 (9th Cir. 1985) (*Karo*). *See McTighe v. Mechanics' Education Society of America*, 772 F.2d 210, 213 (6th Cir. 1985) (employer had no duty to comply with the terms of the agreement in its dealings with plaintiff "because he was not a member of the collective bargaining unit."). Petitioners herein lack standing to sue as bargaining unit members because, as they concede (Pet. 12), they are not members of the foremen's unit represented by Local 94. Rather, Petitioners are merely individuals who applied for and were denied registration as foremen of longshoremen.

Nor do Petitioners have standing to sue PMA and Local 94 as third party beneficiaries of the Port Supplement. Petitioners cannot establish that they are "third party beneficiaries" under California law, which is applicable to this action. *See Karo*, 762 F.2d at 821, 822.[1]

California Civil Code Section 1559 provides that "[a] contract, made *expressly* for the benefit of a third party, may be enforced by him at any time before the parties thereto rescind it" (emphasis supplied). Interpreting Section 1559, the court explained in *Karo*, 762 F.2d at 821-822, that "[a] third party qualifies as a beneficiary under a contract [only] *if the parties intended to benefit the third party and the terms of the contract make that intent evident*". (emphasis supplied). *Accord: Ascherman v. General Reinsurance Corp.*, 183 Cal.App.3d 307, 311-312, 228 Cal.Rptr. 1 (1986). *See Cunha v. Ward Foods, Inc.*, 804 F.2d 1418, 1428 n.9 (9th Cir. 1986) citing *Karo* for the following proposition: "when a person is not a member of a collective bargaining unit, and the collective bargaining agreement does not

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[1] Petitioners cite (Pet. 28) *IBEW v. Hechler*, ___ U.S. ___, 95 L.Ed. 2d 791, 804 n.7, for the proposition that "third party beneficiaries to a collective bargaining agreement ordinarily have the right to bring a . . . claim based on the contract." This statement hardly furthers Petitioners' cause; the question here is not whether third party beneficiaries can sue, but whether the district court clearly erred in finding that Petitioners do not qualify as third party beneficiaries of the Foremen's Agreement and Port Supplement.

grant expressly benefits to third parties, such parties cannot claim third party beneficiary rights."

Further, even if a contract, "if carried out according to its terms, would inure to [the benefit of a third party], it is not sufficient to entitle him to demand its fulfillment. It must appear to have been the intention *of the parties* to secure to him personally the benefit of its provisions." *Walters v. Calderon*, 25 Cal.App.3d 863, 871, 102 Cal.Rptr. 89 (1972) (emphasis in original). *Accord: Walters v. Marler*, 83 Cal.App.3d 1, 32, 147 Cal.Rptr. 685 (1978). *See also Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429, 440 n.13 (9th Cir. 1979) ("incidental beneficiary" had no standing to sue; "[w]here there was no direct undertaking or intention to benefit him he had no rights under [the] contract"); *Martinez v. Socoma Companies, Inc.*, 11 Cal.3d 394, 113 Cal.Rptr. 585, 521 P.2d 841 (1974) (government contracts under which private manufacturers agreed to provide job training and at least one year of employment to disadvantaged plaintiffs could not be enforced by such plaintiffs as third party beneficiaries; even though plaintiffs unquestionably would benefit from performance of the contracts, there was no intent to confer a direct right of performance on the disadvantaged plaintiffs). Application of the above principles forces the conclusion that Petitioners herein lack standing as third party beneficiaries.[2]

First, the Port Supplement does not expressly name any non-party beneficiaries or identify a class of such beneficiaries. Rather, as the district court found (Pet.App. 29a), "[t]he registration provisions of the Port Supplement apply equally to any individual seeking employment with PMA as a foreman of longshoremen". *See Karo*, 762 F.2d at 822 (agreement equally applicable to any

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[2] In *Karo, supra*, the court applied the above principles and held that the plaintiff-job applicant was not a third party beneficiary. The court reasoned that "[t]here is nothing in the agreement which indicates that the [selection] procedure is for the benefit" of plaintiff or any particular class that may include plaintiff as a member. Rather, the agreement "[o]n its face . . . is equally applicable to any musician seeking employment with the Symphony. Moreover, there is no indication that the provision was intended to benefit union members rather than the Symphony." 762 F.2d at 822.

musician seeking employment with the Symphony does not meet the "refer to and identify a class" requirement).

Moreover, the registration provisions and procedures jointly established by PMA and Local 94 clearly do not manifest their *intention* to confer upon non-party job applicants a legal right to performance. *See Martinez v. Socoma Companies, Inc.*, 11 Cal.3d at 397 ("the contracts nowhere state that either [party to the contracts is] to be liable to persons such as plaintiffs for damages resulting from the defendants' nonperformance."). Indeed, it is extremely implausible that PMA and Local 94, in adopting the registration provisions of the Port Supplement, ever intended to impose on themselves such a wide net of potential liability.

Rather, the registration procedures and qualifying factors negotiated by PMA and Local 94 are manifestly designed for the benefit of PMA member employers—to ensure that the foremen selected will serve them with a certain level of skill and expertise —and for the benefit of Local 94 and the foremen's bargaining unit it represents—by maintaining the standards of the trade, a traditional trade union goal. This is fully consistent with the clear intent of the other provisions of the Foremen's Agreement and Port Supplement—such as those dealing with wages, hours, manning, management rights and strikes. These provisions, like those of any standard collective bargaining agreement, were obviously agreed to for the mutual benefit of Local 94 and its members and the members of PMA. There is no plausible reason to separate out the registration provisions from the overall purpose and intent of the Foremen's Agreement and Port Supplement.

Thus, the district court's finding that PMA and Local 94 did not intend to grant a right of performance to third parties is not clearly erroneous. Absent a finding of the requisite intent, the district court properly concluded that Petitioners lack standing to sue as third party beneficiaries.

1. Petitioners' Contrary Contentions Are Meritless

Petitioners first assert (Pet. 35, 37, 38-39) that as "applicants" for registration, as "individuals on the list of prospective foremen", or as Class "A" longshoremen with 5 or more years of experience, they are members of a class referred to and identified

in the Port Supplement.[3] "As such", Petitioners contend (Pet. 37-38), they "have standing to require PMA and Local 94 to comply with the mandatory provisions . . . of the Port Supplement . . .". Petitioners' argument is obviously deficient, however, because it assumes away the very issue requiring resolution: the issue of intent.

Thus, Petitioners suggest by their argument that a member of a class "referred to and identified" in a contract is, *ipso facto*, a third party beneficiary entitled to enforce the agreement. Of course, as the court explained in *Karo*, and as Petitioners recognize elsewhere in their petition (Pet. 32), the relevant test is not "class membership" but whether "the parties intended to benefit the third party and the terms of the contract make that intent evident." *Karo*, 762 F.2d at 821-822. Petitioners' suggestion, therefore, that a "class member" has a legal right to enforce a contract without showing that the parties intended to confer such a right on the class, is a clear misstatement of third party beneficiary law.

Petitioners next assert (Pet. 39) that the "conduct" of PMA and Local 94, as revealed by certain documentary evidence extrinsic to the contract—the foremen's application, the application instruction sheet and minutes of the Joint Committee—demonstrates that Petitioners have standing to sue as third party beneficiaries. Thus, Petitioners argue, essentially, that because this extrinsic documentary evidence purportedly shows that PMA and Local 94 agreed to govern the registration process in "strict accordance" with Section 8 of the Port Supplement, Petitioners "can reasonably expect and require PMA and Local 94 to comply with the provisions of Section 8 of the Port

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[3] Petitioners' attempt to create a "class" where none exists is unavailing. Their reliance on the "list of prospective foremen" is without merit for the simple reason that when the Port Supplement was negotiated—indeed, when Petitioners applied for registration—there was no such list in existence. The list was generated only after the applicants had been scored, interviewed and re-scored. Further, the "5 year" requirement does not create a "class"; it is simply another qualification factor which applies equally to all job applicants.

Supplement in selecting individuals for registration as foremen". Petitioners' contention, again, begs the central question of intent. Suffice it to say that the mutual agreement of PMA and Local 94 to be bound by the provisions of the Port Supplement, as interpreted and applied by them, in no way establishes a direct undertaking or intention by them to confer a universal right of performance on applicants for foremen's registration.

Finally, Petitioners argue (Pet. 44-45) that the availability of a grievance forum for dissatisfied applicants "implies an intent on the part of PMA and Local 94 to make Petitioners third party beneficiaries to the contract . . . ". Petitioners fail to articulate, however, the basis for this asserted "implication". In any case, it should be obvious that the availability of a grievance forum for applicants to express their dissatisfaction with the Joint Committee's action on their applications in no way establishes an intention, on the part of PMA and Local 94, to confer a right of performance of the Port Supplement on applicants for foremen's registration. Rather, as the court of appeals explained (Pet.App. 20a), the grievance mechanism

> increases the likelihood a qualified but errantly rejected applicant will be registered. This assists in the selection of the best qualified of those applying . . . .

In relying on the grievance forum, Petitioners turn its significance inside out. It creates, at most, a procedural mechanism which affords unsuccessful applicants an opportunity to inquire as to the reasons for which they were not selected and an opportunity to be heard. This procedure furnishes no substantive rights under the Port Supplement.

If PMA and Local 94 had wished to confer such rights they easily could have made that explicit in the Port Supplement. Yet, they did not do that. Absent such an expression of intent in the Port Supplement, it cannot reasonably be concluded that the grievance forum itself was intended to create any contractual right to performance for non-party job applicants. Petitioners' contrary contention is without merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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